85-1611

NO.

Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KENNETH C. GRIMES

v.

LOUISVILLE AND NASHVILLE R. CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Date:
04/21/86

QUESTIONS PRESENTED

1. Whether the District Court's decision was "objectively reasonable", when in its judgment, refused to confirm an NRAB awards enforcement provision for damages in violation of Conely v. Gibson, supra, 355 U.S. at 45, 78 S.Ct. at 102. When enforcement was a matter of right under Ind. Trial Rule Procedures 38(E).

2. Whether a Court of Appeals shall waive a right to an enforcement claim for damages as a remedy when (a) the District Court did not receive a motion by the defendant to waive the enforcement claim for damages in violation of Johnson v. New York H.H. and H.R. Co., 1952. 344 U.S. 48, 50, 73 S.Ct. 125, 97, L.Ed. 77 and (b) when the Court of Appeals weighted the evidence and reassessed a conclusion reached in District Court on the same subject matter in violation of Hommel v. Jackson Atlantic

Lines, Inc., 5 Cir. 1971 438 F.2d 307 and Cone v. West Virginia Pulp and Paper Co., (1947) 330 U.S. 212, 91 L.Ed. 849, 67 S.Ct, 752. Supreme Court Rule 17 1(a) (c).

3. Whether the District and Appeals Courts abused judicial discretion.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

KENNETH C. GRIMES

v.

LOUISVILLE AND NASHVILLE R. CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Kenneth C. Grimes, as Plaintiff, hereby petitions for a writ of certiorari to review the judgment of The United States Court of Appeals for the Seventh Circuit and The United States District Court for the Southern District of Indiana in this case.

CITATION OF OPINION BELOW

Kenneth C. Grimes v. Louisville and Nashville Railroad Co; 583 F. Supp 642 (1984) (No. 84-2749 7th Cir., filed October 12, 1984) (No. 81-130-C U.S. Dist. Ct., S. Dist. Ind. filed June 11, 1981 adjudged Sept. 14, 1984.)

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1985. A petition for rehearing was denied July 25, 1985. Submitted to this court October 22, 1985, Ext. of Time Granted by Court. Resubmitted April 21, 1986. The jurisdiction of this court is invoked under 28 U.S.C. 1651(a).

CONSTITUTIONAL PROVISION INVOLVED

Const Art 1 24; Art 7, 1,. Heath v. Fenning, 40 N.E.2d 329, 331, 219 Ind 629.

STATEMENT OF THE CASE

On June 13, 1979, the second division of the National Railroad Adjustment Board (NRAB) rendered a decision based on binding arbitration by a referee. The disputed issue, was whether the company impaired Grimes's seniority rights upon reinstatement July 9, 1979.[1] The agent with the responsibility of carrying out the

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[1]App E infra at 32a

decision of the NRAB award, showed indifference, in a willful, knowing act, when he reinstated the petitioner (Grimes) to a position that impaired his seniority rights.[2] The agent under oath in deposition stated the following (A) "But I do know that, of course, we left him at apprenticeship status and we never made any adjustments in his apprenticeship hours." (B) Question: did the fact that he was reinstated according to the National Railroad Adjustment Board with his seniority rights unimpaired play any part in your decision whether or not to put him in an apprenticeship status or an upgraded status? Answer: "No." (C) "Mr. Grimes just wasn't able to accept the fact that, that's the way as management we decided it had to be. But I did advise him of his

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[2] Ibid at 1 Conder v. Hull Lift Truck, Inc., N.E. 538 (Ind App 1980)

rights"..."then ultimately you know, it could be appealed to a higher court, other than myself."[3] The company knew the hazards involved, and was indifferent to the conditions imposed by the arbitrator.[4] This was a breach of a mutually assented good faith agreement. This action caused injury, damages, and suit in district court.[5] After exhausting all administrative remedies counsel filed suit for Grimes in district Court on the enforcement issue in accordance with 45 USCA § 153 first (p), (r).[6] Relief by this statute is available by following FRCP

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[3]U.S. Dist. Ct. Trial Transcript, Plaintiff's Exhibit No. 1, Appellant's Brief at P. 11, 12. Deposition filed April 1982 B. R. Montgomery P. 46-47

[4]Turner v. Commonwealth Edison Co.; 35 Ill. App 3d 331, 341 N.E.2d 488, 493; Georgia Power Co. v. Deese, 78 Ga (Cont. Table of Authorities)

[5]45 U.S.C.A. § 153(L)(M)(P)(R)

[6]Ibid at 5

81(b) and 69(a). Under the state statute involved NRAB awards are treated as "written verified instruments and construed as prima facie evidence." "No proof is required of the findings of the order is required unless specially denied by pleading under oath."[7] On August 6, 1981, the defendants responded in answer. The response specially denied allegation (A-C) of paragraph twenty-three (23) of the petitioner's complaint.[8] On July 9, 1982, summary judgment hearing was held on all the issues. In response and support of their special denial, the defendants claimed they retained a discretionary right to reinstatement.[9] The petitioner's second

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[7]IC 8-4-29-1--IC 8-4-29-5

[8]Defendant's L and N R. Co. Answer to Complaint at paragraph 17 filed August 6, 1981

[9]Dist. Ct. Record, Summary Judgment Hearing, Filed July 9, 1982. See P. 13

attorney, provided express constructive notice on seven different occasions at the hearings.[10] The language and motions were consistant with what is asked of a pleader under IC 34-4-2-16.[11] Moreover, at the hearing it was noticed by the defendant's counsel that "the pre-trial order I think was composed about the time that his counsel withdrew from the case".[12] On February 10, 1984, the district court issued a Summary Judgment order on counts one through five.[13] The judgment held a retaliation claim for trial for the plaintiff. But, the judgement did not

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[10]Ibid at 9, also see P. 20 Lines 6, 19, P. 21 Lines 2, 3, 9, 13, P. 22 Line 17

[11]IC 34-4-2-16 Application to Court for awards is made upon notice provided by law or rule, Local Rule 8(c) and follows FRCP 7(b)(1) on notice.

[12]Ibid at 9, see P. 17 Lines 10, 11.

[13]Grimes v. Louisville & Nashville R. Co., 583 F.Supp 642 (1984)

confirm the award.[14] The effect on the enforcement issue was: (1) The enforcement claim became an ancilliary proceeding.[15] (2) It settled the genuine material issue. The Court ruled, "Grimes returned to work on July 9, 1979, as an "electrician apprentice" rather than an "upgraded electrician apprentice" and although it is not entirely clear, it appears that his seniority rights may have been impaired.[16] (3) This judgment removed the disputed question of seniority rights impairment as a bar. In effect, this allowed this part of the awards decision to be construed as a showing of prima evidence upon motion at

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[14]IC 34-4-2-12, 19 Confirmation of Award by Court § 12, provides docketing under 19 recovery for damages, IC 8-4-29-2.

[15]FRCP 81(b) Vassel el v. Durning (1945 CA 2 NY) 152 F.2d 455; Marshal v. Crotty (1950 D.C. Mass) 88 F.Supp 30 Affd (CA 1 Mass) 185 F.2d 622.

[16]Ibid at 13 see opinion.

trial.[17] For reasons that are unclear to this petitioner, the second attorney withdrew, leaving this litigant no choice but to proceed pro se. After a failed interlocutory appeal, the petitioner entered into the record a stipulated agreement, up to that point, of the cost and damages dated June 15, 1984.[18] On July 26, 1984, the retaliation claim came on for trial. The enforcement claim, by applicable law and evidence followed IC 8-4-29-1--IC 8-4-29-5, FRCP 8(a)(1) allowed the claim to be a proceeding to enforce a judgment previously obtained in the same court. Where as ITRP 13(b) and 9(E) in permitting a permissive counter claim, states that "it is sufficient to simply

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[17] Ibid at 7, Special denials as bar to prima facia showing

[18] Local Rule 19(J) and IC 34-4-1-17 Cones v. Vanosdol, 1853, 4 Ind, 248 Kintner v. State, 1851, 3 Ind. 86.

aver the judgment or decision." Upon trial, the petitioner pleaded in motion to confirm the award.

Mr. Grimes: ...I was...hoping...to show that...efforts....

Court: Efforts to what?

Mr. Grimes: To oppose the acceptance of a reduced and demoted status of (1) not having or being reinstated with my seniority rights unimpaired. As (2) the judge had ordered in that order.

The Court: Objection is overruled: show that admitted.[19] The motion sought confirmation of the award showing specific express notice and comment of the seniority rights impairment dispute.[20] This was a

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[19]U.S. Dist. Ct. Trial Transcript filed July 26, 1984 (retaliation) see p. 6 Lines 1-6, P. 7 Lines 10-15, P. 13 Lines 1-8, P. 16 Lines 7-9, P. 17 Line 25, P. 18 Lines 1-3

[20]F. P. Baugh, Inc. v. Little Lake Lumber Co., C.A. Cal, 297 F.2d 692, 696

claim for a substantial right.[21] This enforcement claim for damages was provided in complaint,[22] noticed seven times as a live issue at the summary judgment hearing, and made prima facie evidence at the retaliation claim trial upon motion as the "judge had ordered in that order." The court refused to confirm the enforcement claim for damages. After, taking the arguments under advisement, the court on September 14, 1984, granted motion by the defendant for an involuntary dismissal under FRCP 41(b) on the grounds that, based on the applicable law and evidence presented, the plaintiff had shown

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[21] University City v. Home Fire & Marine Ins. Co. (1940, CA 8 MO) 114 F.2d 288, Harmless error...is not intended to deprive a litigant of a substantial right.

[22] App D infra at 25a

no right to relief on the retaliation claim.[23] The court's ruling, thereafter followed the motion stating that, the court can find nothing which lends support to Grimes's argument that the railroad retaliated. Both the court and defendant responded exclusively to the retaliation claim.[24] This petitioner appealed the decision to the seventh circuit court of appeals.[25] The petitioner, then argued exclusively on the enforcement claim for damages, in a main, reply, and rehearing briefs.[26] On June 12, 1985, the appeals court, affirmed the district court retaliation claim decision and waived the

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[23]Dist. Ct. order issued Sept. 14, 1984, P. 3 para 3, Ibid at 9, P. 12 Line 6

[24]Ibid at 23

[25]App C Infra at 6a

[26]App A at 1a and App B at 2a-5a

enforcement claim. The appeals court relying solely on Laketon which stated in point, "an appeals court will not consider an argument raised for the first time on appeal." The court then denied the enforcement claims on the following grounds: (1) Grimes did not develop the enforcement issue argument in the earlier summary judgment hearing, (2) that the enforcement issue was not raised before the motion for involuntary dismissal by the defendants, (3) and that there was not even an oblique reference to the enforcement issue. For these reasons the court based its decision and "waived" the enforcement claim for damages.[27]

REASONS WHY THE PEITION SHOULD ISSUE

The court should grant the peition to settle the question raised by its decisions

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[27]App B at 2a-5a.

of whether the district court's decision was "objectively reasonable", when in its judgment refused to confirm an NRAB awards enforcement provision for damages in violation of Conely v. Gibson supra, 355 U.S. at 45, 78 S.Ct. at 102, when enforcement was a matter of right under Ind. Trial Rule Procedure 38(E).

The oral motion made by the plaintiff for confirmation of the award at the retaliation claim trial, in conjunction with the motion in complaint and the award attached made confirmation mandatory.[28] The district court's refusal to confirm the award for damages is uncertain in its meaning, mainly because there was a ruling in part on the award but the decision refused confirmation of the award, therefore denying damages of a substantial

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[28] ITRP 38(E) "upon motion, the courts have no right to refuse an enforcement claim for damages.

right.[29] This court has held in response to this kind of decision the following conclusion: "Findings of a district court must be set aside by a reviewing court where it is uncertain what they mean." See Schine Chain Theatres v. United States, 334 U.S. 110, 68 S.Ct., 947. The district court granted a motion by the defendant under FRCP 41(b) motion of involuntary dismissal, for failure to state a claim and shown no right to relief based on the applicable law and evidence on retaliation. This was the court's cause for denying damages to a confirmation of the award on the enforcement provisions. The court's conclusion was faulty based on the following reasons: (1) The defendant did not motion for waiver pursuant to FRCP 8(c) or under ITRP 8(c) as is required on an

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[29]See District Court decision Sept. 14, 1984, record. Ibid, at 23

affirmative defense. This is contrary to the court's action of waiver on this issue. A party in the suit has the burden of proof on waiver under ITRP 8(c). In the instant case ITRP 8(c) provides that "these rules are subject to the rules of evidence or any other statute fixing a different rule." ITRP 38(E) under Title 34 provided such different rule for enforcement. It states "nothing in these rules shall deny the parties by contract or agreement or--the court's power to specially enforce such agreements. This rule provided the district court with no discretion to refuse to enforce an enforcement claim for damages, as required under IC 8-4-29-2.[30]

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[30]IC 8-4-29-2 "such suits shall proceed in all respects like other civil suits for damages; except that...findings and order...shall be prima facie evidence of the facts."

(2) The defendants failed to make a timely motion to vacate the arbitration award and was therefore precluded from raising an affirmative defense.[31] IC 34-4-2-13 provides a 90-day time limit in which to raise a ground to vacate an award under the uniform Arbitration Act.[32] A court, pursuant to the uniform Arbitration Act shall affirm an award unless the other party has filed an application to vacate, modify or correct the award.[33] Moreover,

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[31]Chauffers, Teamster, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co; CA 1980, 628 F.2d 1023, cert den 101 S.Ct. 942, 449 U.S. 1125, 67 L.Ed. 111.

[32]Ibid at 31.

[33]Personnel Division v. Sightes, App 1981, 416 N.E.2d. 445 at (5), "An application to vacate IC 34-4-2-13 or to modify or correct award, IC 34-4-2-14, generally must be made within 90 days after a copy of the award is mailed to the appplicant. An application for confirmation of an award may not be made before 90 days after a copy of the award is mailed to the parties. Ind. Code 34-4-2-12.

in Delaware v. Williams, it was held that denial of relief is justified on only one of two grounds, namely (a) the fact situation does not warrant the relief (seniority rights impairment became a proven fact) and (b) the statute does not permit the relief being given. The language of the controlling statute provided damages as relief of this complaint.[34] The petitioner acquired specific jurisdiction to enforce a judgment previously obtained in the same court and showed that the district court had jurisdiction within the meaning of FRCP 8(a)(1). Adoption of the motion at trial, to confirm the award for damages is not based on a demanding standard, when the motion is based on prima facie evidence, and represents a substantial right.[35]

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[34]Delaware and Hudson R. Co., et al v. Williams, 129 F.2d 11.

[35]Ibid at 21

This court has held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (Conley v. Gibson supra, 355 U.S. at 45, 78 S.Ct. at 102). Moore indicates as well that a motion to dismiss is not to be granted except when it appears "to a certainty that the plaintiff can prove no state of facts in support of his claim which would entitle him to relief. This rule, which has been stated literally hundreds of times precludes final dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations that show on the face of the complaint some insuperable bar to relief. This court has considered a substantial right as such, as having more value, and force than technical error.[36]

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[36]Ibid at 35

This tolerance with respect to claims for relief as well as the correlative intolerance with respect to motions to dismiss rests upon the principle that discovery and other pretrial procedures serve to the purpose of more precise disclosure of the facts, thereby narrowing both the disputed facts and issues left for trial. On the other hand, pleading to respect, need only give the defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Based on this reasoning in Conley, it is not being objectionably reasonable when the action by the district court, knowingly refused, to adopt a prima facie showing for enforcement damages.[37] This is a misapplication of a rule that has been

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[37]Abuse of Discretion Summary Judgment July 1982, Sec P. 12 Line 6. The Court: "He represented himself didn't he?"

stated hundreds of times. To waive relief in damages in this case is akin to abolishment of a remedy for NRAB awards, and is contrary to the constitution which holds: "To impose any additional obligation upon a contract already existing impairs obligation of contract in violation of the Federal Constitution.[38] The district court denied a good faith agreement of the NRAB its full adjudication.[39] Rights in good faith agreements should be upheld by the judicial process not abolished. Any other view of NRAB awards is to do injustice to the clear intent of Congress. It would defeat the object of the underlying legislation,

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[38]Re Lott, 49 NY 2d 134, 138,...Const Art. 1 § 24; Art 7, § 1, see Table of Authorities this Petition.

[39]Justice v. Lange, 42 NY, 493, 496 1 AM Rep 576; Langimble v. State, 4 Tex App, 312, 321. Ed v. Kearzey, 96 U.S. 595, 599, 24 L.Ed. 793.

nullify, the Railroad Labor Act and make arbitration proceedings a farce.[40] Namely, by (1) excusing the defendant from a duty imposed by binding arbitration, and (2) render the remedy under the statute as useless.[41]

The Court should grant the petition to settle the question of whether a court of appeals shall waive a right to an enforcement claim for damages as a remedy when (a) the district court did not receive a motion by the defendant to waive the enforcement claim in violation of Johnson v. New York H. H. and H. R. Co., 1952, 344 U.S. 48, 50, 73 S.Ct. 125, 97 L.Ed.77 and (b). When the court of appeals weighted the evidence and reassessed a conclusion reached in district court on the same

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[40]Ibid at 34.

[41]Re Ayers, 123 U.S. 443, 31 L.Ed. 216, 8 S.Ct. 164.

subject matter in violation of Hommel v. Jackson Atlantic Lines, Inc. 5 Cir 1971, 438 F.2d 307 and Cone v. West Virginia Pulp and Paper Co. (1947) 330 U.S. 212, 91 L.Ed. 849, 67 S.Ct. 752, Supreme Court rule 17 1(a)(c).

The role of an appellate court, under Indiana law is limited to determining whether the defendant has established any grounds for challenge permitted by the Uniform Arbitration Act.[42] In this case, the grounds for vacating an award is provided in IC 34-4-2-13[43] Furthermore, a defendant who has a valid ground for challenging the award but who fails to raise that challenge within the 90-day time limit should not be permitted to raise that

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[42]Ibid at 33

[43]IC 34-4-2-13 on vacating award by court; also states "The fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award."

challenge when the plaintiff applies for confirmation of his award.[44] Based on the grounds under IC 34-4-2-13, the reasoning used by the court of appeals for waiver would not be valid, notwithstanding the absence of a motion to waiver by the defendants in district court.[45] Under the rules of practice in Indiana and in the federal courts waiver is an affirmative defense which must be pleaded. Confirmation of the award was pleaded on three occasions by the plaintiff at the trial.[46] In order for waiver to occur against the plaintiff he would have to (1) pursue such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may

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[44]Ibid at 42

[45]ITRP 8(c) Rosenthal v. New York Life Ins. Co., CCA MO 99 F.2d 578, 579

[46]Ibid at 45.

be entitled, or (2) where the conduct pursued is inconsistant with any other honest intention than an intention of waiver, (3) provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver and has incurred trouble or expense thereby (4) furthermore, to make out a case of implied "Waiver" of a legal right there must be a clear, unequivocal and decisive act or the party showing such purpose, or acts amounting to an estoppel on his part.[47] The record will show this was not done in this case. The right not to seek an affirmative defense of waiver should not be circumvented by an appellate court.[48] It was held in Johnson v. New

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[47]Ibid at 45.

[48]The record will show there was no motion by the defendants in the District Court proceedings.

York that the appeals court may not grant a final judgment in favor of a party who failed to so move.[49] In this unanimous reversal, the Supreme Court has held that, "such a circuitous method of determining the issue would present the question initially to the appellate court, when the primary discretionary responsibility for its decision rests in the district court."[50] In a similar case, involving an action for a breach of warranty this court reversed unanimously on the grounds that the appeals court had no power to order such a judgment.[51] The motion for involuntary dismissal had in response from

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[49] Johnson v. New York H. H. & H. R. Co.; 1952, 344 U.S. 48, 50, 73 S.Ct. 125, 97 L.Ed. 77.

[50] Ibid at 49 also see Cone v. West Virginia Pulp and Paper Co. (1947) 330 U.S. 212, 91 L.Ed., 849 67 S.Ct. 752.

[51] Globe Liquor Co. v. San Roman (1948) 332 U.S. 571, 92 L.Ed. 177, 68 S.Ct. 246, rel den 333 U.S. 830, 92 L.Ed. 1115, 68 S.Ct. 450

the plaintiff a prima facie showing from motion on the evidence.[52] Moreover, the conclusion reached by the appeals court, that the plaintiff did not develop the enforcement argument at the hearing on summary judgment of July 9, 1982, was faulty.[53] The plaintiff's counsel provided sufficient express, notice and comment in accordance with FRCP 7(b)(1) and local rule 8(c). Fair noticewas provided.[54] This appellate court's action is contrary to rule reached in Hommel v. Jackson which states, "The appellate court may not view the sufficiency of the evidence and grant a final judgment in favor of a party who failed to move." Waiver, in Indiana "is

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[52]Ibid at 19, Conley v. Gibson Supra, 355 U.S. at 45 p. 78 S.Ct. a 103 also, see ITRP 50(E) Motion for Judgment N.O.V. motion in arrest of judgment, demurrer. To evidence and venire de novo "abolished".

[53]App. B infra at 4a.

[54]Ibid at 52.

subject to the rules of evidence."[55] To say a party did not develop the enforcement issue argument for damages at the earlier summary judgment hearing is to weight evidence and reassess conclusions reached on specific notice and comment, presented by plaintiff's counsel at the hearing. The comment was based on local rule 10, as supported therein by depositions, answers to interrogatories, admissions and affidavits filed.[56] Moreover, to substitute waiver, as a different conclusion reached by the district court, that "Grimes's seniority rights may have been impaired" is to differ on the subject matter that is the basis for enforcement. This action by the court, also violates ITRP 52(A) "where due regard will be given

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[55]Ibid at 45.

[56]District Court, Summary Judgment Hearing p. 17 Line 24.

to the trial judge to judge the credibility of witnessess."[57] This was not a position the appeals court was in, notwithstanding the difference of opinion on the subject matter. Both the district and appeals court failed to confirm the award which was a clear legal right and a prerequisite for damages on the enforcement claim.[58] This difference of opinion among other violations is in need of this court's supervisory powers, pursuant to supreme court rule 17.1(a)(c). This peitioner has exhausted all appeals and adequate relief cannot be had in any other forum from any other court and that there are present exceptional circumstance warranting the exercise of this court's discretionary powers.

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[57] ITRP 52(A).

[58] IC 34-1-58-1 at 12. See Brown v. Excel Brune, 1977, 359 N.E. 2d 608, 172 Ind App 31, ITRP 69(E); Maine Cent R. Co v. Bangor and Aroostook R. Co; ME 1978 395 A 2d 1107.

CONDITIONS PRECEDENT

Petitioner has complied with all conditions precedent to all causes of action within.

IRREPARABLE INJURY

The petitioner has no total, plain, adequate or complete remedy at law to redress the wrongs herein and monetary damages authorized by Hamlet Hosp. and Training School v. Joint Committee, N.C. 68 S. F.2d 862(6)(9) is an only means of securing relief. Petitioner is now suffering and continues to suffer irreparable injury from the defendant's unlawful practices as set forth herein unless enjoined by this honorable court.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully prays that the court:

(A) Grant monetary damages authorized by IC 8-4-29-2 and included in complaint, attached at App Infra at D. under section

XII at (F) p. 25a . and monetary damages allowed under rule 34, Infra App. at D, p. 10a; section XI p. 22(a) which was also included in stipulation filed June 15, 1984.

B. Grant rule, excepting this petition as application under IC 34-4-2-12, where as "upon application of a party, but not before ninety (90) days after the mailing of a copy of the award to the parties, the court shall confirm an award, "said ninety-(90) day period expiring on or about September 11, 1979.

C. Grant rule under IC 34-4-1-13, "where the court shall grant rule thereon against the adverse party," and issue judgment under IC 34-4-1-19 confirming award, where judgment shall be given in favor or any party to whom any sum of money or damages shall have been awarded that he recover the same; adopting the file date of September 11, 1981, as application date

under IC 34-4-2-16.

D. Issue a writ of execution pursuant to ITRP 69(E), or in the alternative a writ of mandamus, as authorized by 45 USCA 153 first (p), under the all writs act, 28 USC . 1651(a), to if necessary compel the district court to act if no other alternative is available.

E. Grant attorneys fees to the petitioner as authorized under 45 USCA . 153 first (p) and IC 8-4-29-2, at Eighty Dollars ($80.00) per hour as Pro Se on study, labor, research on 28,000 (twenty-eight thousand) hours as amended represents a twelve- (12) hour day.

F. Grant consideration that manifest injustice would occur if reinstated to the job site, against the defendants and this petitioner's will. (See Trial Transcript at plaintiff's exhibit 21 and p. 13, lines 2-8, p. 17-18, line 25.

G. Grant to the petitioner such further and alternative relief as the court shall deem just and reasonable in the premises.

CONCLUSION

For all of the above reasons, this Petition should be granted.

Respectfully submitted

Kenneth C. Grimes, Pro Se
621 East Gum Street
Evansville, Indiana 47713
Phone 1-812-423-1600

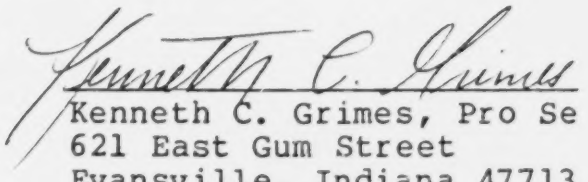
CERTIFICATE OF MAILING

The undersigned, counselor pro se, hereby certifies that he caused to be mailed, postage pre-paid, first class, or personally served, on this 21st day of April, 1986, the following copies of this Petition for Certiorari:

Forty (40) copies to
Clerk, United States Supreme Court
Washington, D.C. 20543; and

Three (3) copies to
Attorney Galen J. White, Jr.
Boehl, Stopher, Graves & Deindoerfor
United Kentucky Bank Bldg.
One Riverfront Plaza
Louisville, Ky. 40202
Telephone 1-502-589-5980;

Three (3) copies to
Attorney F. Wesley Bowers
Bowers, Harrison, Kent & Miller
Fourth Floor, Permanent Savings Bldg.
Evansville, Ind. 47708
Telephone 1-812-426-1231.



Kenneth C. Grimes, Pro Se
621 East Gum Street
Evansville, Indiana 47713
1-812-423-1600
Counsel as Pro Se

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 25, 1985

Before
Hon. Walter J. Cummings, Chief Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

KENNETH C. GRIMES, Plaintiff-Appellant,	) Appeal from the) United States) District Court
vs.	) for the Southern) District of
No. 84-2749	) Indiana,
LOUISVILLE and NASHVILLE RAILROAD COMPANY, Defendant-Appellee.	) Evansville) Division) No. 81 C 130) Gene Brooks,) Judge

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant Kenneth C. Grimes, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

JUDGMENT--WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 12, 1985

Before
Hon. Walter J. Cummings, Chief Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

KENNETH C. GRIMES, Plaintiff-Appellant,	Appeal From United States District Court for the
No. 84-2749 vs.	Southern District of Indiana,
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant-Appellee.	Evansville Div. No. 81 C 130 Judge Gene E. Brooks

This cause came before the Court for decision on the record from the United States District Court for the Southern District of Indiana, Evansville Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with cost, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Submitted June 10, 1985)*

Before
Hon. Walter J. Cummings, Chief Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

KENNETH C. GRIMES, Plaintiff-Appellant	) Appeal From United States District Court for the Southern District of Indiana, Evansville Div. No. 81 C 130 Gene E. Brooks, Judge.
No. 84-2749 vs.	
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant-Appellee	

O R D E R

Plaintiff Kenneth C. Grimes brought suit against his employer and union, charging in separate counts: (1) that the employer breached its collective bargaining agreement, (2) that the union breached its duty of fair representation, (3) that both the employer and union discriminated against him, in

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

violation of 42 U.S.C. § 2000e et seq., and (4) that both the employer and union conspired to deprive him of his civil rights, in violation of 42 U.S.C. § 1985. A fifth count concerned Grimes's appeal, pursuant to 45 U.S.C. §153 First (p), of an arbitration decision by the National Railroad Adjustment Board (the "NRAB"). The district court granted summary judgment in favor of the union on all counts, and summary judgment in favor of the employer on all counts except the third. Grimes v. Louisville and Nashville Ry. Co., 583 F. Supp 642 (S.D. Ind. 1984). The court concluded that genuine issues of material fact remained as to whether the employer violated 42 U.S.C. § 2000e-3(a) when it allegedly retaliated against Grimes by placing him on furlough because he filed a charge of discrimination with the Equal Employment Opportunity Commission. Following a trial the court granted the employer an involuntary dismissal on that claim. Fed. R. Civ. P. 41(b).

On appeal, Grimes challenges neither the involuntary dismissal nor the earlier grant of summary judgment. He instead argues that the employer failed to comply with the NRAB award. While Grimes, in his prayer for relief, requested a preliminary and permanent injunction directing his employer to comply with the NRAB decision, he failed to develop this argument in the face of motions for summary judgment and involuntary dismissal. Grimes cannot blithely hold this argument in reserve for appellate review in the face of such motions. Considerations of orderly dispute resolution required him to do more than rest silently on the language in his complaint as the district court considered the disposition of charges. Cf. Laketon

Asphalt Refining, Inc. v. United States Dept. of the Interior, 624 F. 2d 784, 788-89 (7th Cir. 1980). And While Grimes maintains that enforcement of the NRAB decision is inextricably intertwined with the "retaliatory furlough" issue tried below, the trial record fails to disclose even an oblique reference to the former issue. This is not surprising since, contrary to Grimes's assertion, the issues are legally distinct. Finding the enforcement question waived, the decision of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES, Plaintiff	)	
vs.	)	CAUSE NO. EV 81-130-C
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LOCAL 1353, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Defendants	)	

AMENDED TO CORRECT TYPOGRAPHICAL ERROR
Line 2 (b)

NOTICE OF APPEAL TO A COURT OF
APPEALS FROM A JUDGMENT OR
ORDER OF A DISTRICT COURT

Notice is hereby given that Kenneth C. Grimes, Plaintiff above named pursuant to 28 U.S.C. § 1291., hereby appeals to the United States Court of Appeals for the SEVENTH CIRCUIT (from the final judgment) entered in this action of the 14th day of September, 1984. Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

KENNETH C. GRIMES, Plaintiff	)	
vs.	)	CAUSE NO. EV 81-130-C
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LOCAL 1353, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Defendants	)	

COMPLAINT FOR DAMAGES, DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. JURISDICTION

1. This action presents special Federal Questions and is instituted pursuant to 28 USC § 1331(b), 28 USC § 1343(1) and 28 USC § 1343(4). Jurisdiction is founded upon Section 301 of the Labor Management Relations Act, June 23, 1947, c. 121, Title III, Section 301, 61 Stat. 156, as amended; Section 151 et seq. of the Railway Labor Act. 1934, 48 Stat. 1185, 45 USC § 151 Chapter 8, as amended; Title VII

of the Civil Rights Act of 1964, 78 Stat. 253, 42 USC § 2000e et seq.; and 42 USC § 1985, without respect to the amount in controversy and without regard to the citizenship of the parties.

II. NATURE OF THE PROCEEDING

2. This is a proceeding for back pay and benefits, a Declaratory Judgment as to the Plaintiff's rights and for a permanent injunction enjoining the Defendants from retaliating against the Plaintiff in violation of Section 704(a) of the Civil Rights Act of 1964, 42 USC § 2000e-3(a), discriminating against the Plaintiff because of his race or color with respect to his job classification, seniority status, apprenticeship status, assignments, promotions, and terms, conditions and privileges of employment and from conspiring together to do so.

3. This is also an action

his classification who was assigned to the Howell yards located in Evansville, Indiana.

13. During the period of Plaintiff's employement and subsequent thereto, Plaintiff was subject to the terms, conditions and provisions of a Collective Bargaining Agreement between "Company" and "Union" dated September 1, 1943, with revisions thereto, a true and correct copy of which is attached hereto and marked "Exhibit A", hereinafter referred to as "Agreement", which includes the following sections:

> Rule 39(f) which provides that :
>
> "An apprentice shall not be dismissed except for just and sufficient cause before completing his apprenticeship."
>
> Rule 34 which provides that :
>
> "No employee shall be disciplined without a fair hearing by designated officers of the carrier...."
>
> And that:
>
> "If it is found that an employee has

been unjustly suspended or dismissed from service such employee shall be reinstated with his seniority rights unimpaired, and compensated for wage loss, if any, resulting from said suspension or dismissal."

Rule 29(a) which provides that:

"Seniority of each employee covered by this agreement will begin from the date and time the employee starts to work."

Rule 26(a) which provides that:

"When it becomes necessary to reduce expenses, the force at any point or in any department shall be reduced, seniority as per Rule 29 to govern...."

14. On or about September 22, 1976, Plaintiff had a minor altercation with one L. J. Fieber, his temporary supervisor, over the installation of a switch. On that date, Plaintiff was unlawfully and unjustifiably suspended.

15. On or about September 27, 1976, the Defendant "Company" terminated Plaintiff's employment and advised the Plaintiff that he was being discharged for insubordination.

September 27, 1976, and despite Plaintiff's continuing pursuit of this matter and continuing pressure on the "Union", the Plaintiff's appeal did not come before the National Railroad Adjustment Board until almost three (3) years after the incident, though such appeal should have been heard within nine (9) months from the date of the last denial by the "Company".

20. This unlawful delay which caused substantial hardship on the Plaintiff's already overburdened financial condition was in no way caused by or at the instance of the Plaintiff; rather, this delay was caused by or instigated, either solely or jointly by the "union" and/or the "Company" to further damage the Plaintiff and deprive him of his rights.

21. Despite Plaintiff's protestations to the "Union" that these delays and improper representation were greatly endangering the health and

well-being of the Plaintiff and his family, who, without the Plaintiff's income, were able to "enjoy" only the barest necessities of life, "Union" took no action to pursue the timely resolution of Plaintiff's grievance.

22. Following the procedure set forth in the "Agreement" in Article V of Appendix D thereto and the Railway Labor Act (45 USC § 151 et seq.), the Plaintiff timely pursued his administrative remedies, culminating in his appeal before the Second Division of the National Railroad Adjustment Board in June, 1979.

23. That on or before the 13th day of June, 1979, almost three (3) years after his wrongful dismissal, the National Railroad Adjustment Board, Second District, rendered a Decision and Award, numbered 7956, Docket No. 7776, a true and correct copy of which is attached hereto and marked "Exhibit B"; said Board's decision being:

(a) that the penalty of dismissal under the circumstances was excessive, (b) that the Claimant (Plaintiff herein) was to be reinstated to service with his seniority rights unimpaired, but (c) denied him compensation for the three years lost wages and benefits since the date of his dismissal; such decision was the final step in the administrative remedies required to be exhausted under the guidelines established by the "Agreement" and the Railway Labor Act.

24. From September 22, 1976, when the Plaintiff was wrongfully suspended and later discharged, until July 9, 1979, when the Plaintiff was reinstated to service, Plaintiff was unable to obtain other employment and received no income.

25. When Plaintiff was reinstated to employment with the "Company", said reinstatement was to a classification and pay scale which were inferior to the

position and pay scale which he had held prior to his wrongful discharge, in violation of Section 34 of the "Agreement" ("Exhibit A" hereto) and contrary to the Award of the National Railroad Adjustment Board.

26. Plaintiff's reinstatement was in an inferior position on the seniority roster and apprenticeship program; employees hired later than Plaintiff were in higher positions and were promoted over Plaintiff, in direct violation of Section 29(a) of the "Agreement" and the Award of the National Railroad Adjustment Board.

27. Defendant "Union" again failed to represent the Plaintiff in pursuit of his seniority rights under the "Agreement" and under the terms of Award of the National Railroad Adjustment Board, damaging Plaintiff further.

28. On or about March 16, 1981, Plaintiff filed a charge of discrimination

against the Defendant "Company" with the Equal Employment Opportunity Commission alleging that the Defendant "Company" had discriminated against the Plaintiff because of his race. Thereafter, the "Company" retaliated against the Plaintiff for having filed such charge by, on March 30, 1981, unlawfully and maliciously laying off the Plaintiff, the only Black in the trade and the only person to be so furloughed.

29. At the date of filing, Plaintiff is still laid off, and the Defendant "Union" continues to fail to represent the interests of the Plaintiff, damaging him still further.

V. PLEADING PARAGRAPH 1

The Plaintiff, for his first claim, alleges:

30. Paragraph One through Twenty-Nine are hereby incorporated in and made a part of Pleading Paragraph 1.

31. The suspension and discharge of the Plaintiff by the Defendant

"Company", as well as their reinstatement of Plaintiff in an inferior position and at an inferior salary, respect to his position and salary at date of discharge and his subsequent layoff represent direct blatant violations and breaches by Defendant "Company" of the aforesaid "Agreement", and especially of Rule 39(f) relating to discharge, Rule 34 relating to discipline and reinstatement, Rule 29(a) relating to seniority, and Rule 26(a) relating to layoffs.

VI. PLEADING PARAGRAPH 2

The Plaintiff, for his second claim, alleges:

32. Paragraphs One through twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 2.

33. The arbitrary and bad faith failure of the Defendant "Union" to fairly, adequately, and competently, properly and timely reprsent Plaintiff without bias, in

regard to his unlawful suspension, discharge and furlough, and to remedy the inequity apparent in the manner of his reinstatement represent blatant and willful breaches of the Defendant "Union's" duties to fairly represent the Plaintiff, which duties arise under and constitute a violation of the statutory mandate of the National Labor Relations Act and of the "Agreement".

VII. PLEADING PARAGRAPH 3

The Plaintiff, for his third claim, alleges:

34. Paragraphs One through Twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 3.

35. The unlawful and discriminatory employment practices of the Defendants, and each of them, have deprived the Plaintiff of the same right to employment opportunities as are enjoyed by white persons. Such practices are

degrading to the Plaintiff and cause him and his family severe financial, mental and emotional distress. Such practices of invidious racial discrimination against the Plaintiff serve to stigmatize him solely on the basis of his race.

36. The racially discriminatory employment practices of the Defendants and their retaliation toward the Plaintiff were undertaken by the Defendants, and each of them, consciously, intentionally, and maliciously for the invidious purpose of discriminating against the Plaintiff due to his race, and had as their object to deprive him of his civil right to equal opportunity in violation of the Civil Rights Act of 1964.

VIII. PLEADING PARAGRAPH 4

The Plaintiff, for his fourth claim, alleges:

37. Paragraphs One through Twenty-Nine are hereby incorporated and

Twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 4.

38. The racially discriminatory practices of Defendants, and each of them, as described herein, as well as the retaliation of "Company" combined with "Union's" failure to defend and protect Plaintiff's rights therefrom, were undertaken consciously, intentionally and maliciously for the invidious purpose of discriminating against the Plaintiff solely on the basis of race.

39. The practices and policies of the Defendants "Union" and "Company" constitute a conspiracy, the intentional and malicious object thereof being to deprive Plaintiff of his civil rights to equal employment opportunity at the Louisville and Nashville Railroad Company.

40. Each of the unlawful employment practices, as described herein and the retaliation against Plaintiff

herein, were implemented intentionally by Defendants, and each of them, in furtherance of this unlawful conspiracy, causing irreparable injury to Plaintiff, including, but not limited to: loss of equal promotional opportunity, salary, wages, fringe benefits and pension differentials, as well as causing extreme emotional anguish and mental distress to Plaintiff.

IX. PLEADING PARAGRAPH 5

The Plaintiff, for his fifth claim, alleges:

41. Paragraphs One through Twenty-Nine are hereby incorporated and made a part of Pleading Paragraph 5.

42. Pleading Paragraph 5 is an Appeal pursuant to 45 USC § 151 et seq., from the Award of the National Railroad Adjustment Board, Second Division, numbered 7956, Docket No. 7776 ("Exhibit B" herein) insofar as it denies Plaintiff compensation

for lost wages, benefits and increments from September 22, 1976, through July 7, 1979.

43. The National Railroad Adjustment Board found that there were mitigating and extenuating circumstances such as the relative lack of experience of both parties to the underlying incident and that, this being the case, "the discipline of dismissal was excessive..."

44. Having made said findings, the National Railroad Adjustment Board, in a decision contrary to the evidence, proceeded to impose a harsh, unfair, and discriminatory penalty upon the Plaintiff by failing to compensate him for his thirty-seven (37) months without wages or benefits and during which time he suffered extreme financial, mental and emotional distress.

45. Section 34 of the "Agreement" ("Exhibit A" hereto) provides a specific,

definite and exclusive remedy for unjust suspension or dismissal of an employee as set forth in Rhetorical Paragraph 13 herein.

46. The Order of the National Railroad Adjustment Board denying Plaintiff compensation for thirty-seven (37) months of losses, in direct contradiction of its own findings as well as of the mandates of the Railway Labor Act (45 USC § 151 et seq.) is excessive, harsh, discriminatory, arbitrary, capricious and is in complete disregard for the bargained-for explicit and unambiguous provisions of the "Agreement" ("Exhibit A" herein).

X. CONDITIONS PRECEDENT

47. Plaintiff has complied with all conditions precedent to all causes of action herein.

XI. IRREPARABLE INJURY

48. The Plaintiff has no total, plain, adequate or complete remedy at law

to redress the wrongs alleged herein and a suit for back-pay and benefits, and injunctive and declaratory judgment is his only means for securing adequate relief. Plaintiff is now suffering and continues to suffer irreparable injury from the Defendant's unlawful practices as set forth herein unless enjoined by this Honorable Court.

XII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court:

A. Enter a Declaratory Judgment that the practices of the Defendants "Company" and "Union", in the acts, practices, policies and procedures complained of herein have violated and continue to violate the rights of Plaintiff as secured by Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e et seq., and 42 USC § 1985(3).

B. Grant to the Plaintiff a

preliminary and permanent injunction enjoining the Defendants and their agents, successors, employees, attorneys and other representatives acting in their behalf, from engaging in any employment practice or policy which discriminates against the Plaintiff on the basis of his race.

C. Order that a preliminary and permanent injunction issue directing that Defendant "Company" comply with the decision of the National Railroad Appeals Board and restore to him all of his seniority rights and apprenticeship status unimpaired, and directing full and complete compliance with the said decision and award as to those provisions.

D. Enter a Declaratory Judgment, vacating, setting aside and declaring void and unenforceable that section of the Award of the National Railroad Adjustment Board, number 7956, Docket No. 7776, insofar as it constitutes an excessive penalty and that

it unjustly, arbitrarily and discriminately denies to Plaintiff his lost wages, benefits and increments for the period from Setpember 22, 1976, until July 9, 1979.

E. Grant to the Plaintiff a judgment against the Defendant "Company" for all wages, benefits and increments which the Plaintiff would have received had he not been unlawfully terminated; reimbursement for loss of promotional opportunity, apprenticeship experience and education, and other benefits which he might have received had he not been discriminated against.

F. Grant to the Plaintiff compensatory damages in the amount of One Million Dollars ($1,000,000.00), and punitive damages in the amount of Three Million Dollars ($3,000,000.00).

G. Allow to Plaintiff an allowance and reimbursement for all attorney fees and expenses occasioned by

Defendant's deliberate and malicious policies and practices, and Plaintiff's costs herein.

H. Grant to Plaintiff such further and alternative relief as the Court shall deem just and reasonable in the premises.

Respectfully Submitted,

KENNETH C. GRIMES

By_____
KATHARINE VAN OST
Attorney for Plaintiff

Form 1

Award No. 7956
Docket No. 7776
2-L&N-EW-'79

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: (System Federation (No. 91, (Railway Employees' (Department, (A.F. of L.--C.I.O. ((Electrical (Workers) (Louisville and (Nashville (Railroad Company

Dispute: Claim of Employees:

1. That the Louisville and Nashville Railroad Company removed Upgraded Electrician Apprentice K. C. Grimes from service without just and sufficient cause and in so doing deprived him of his rights to earnings from September 21, 1976, until such time as he is restored to service.

2. That, accordingly, the Louisville and Nashville Railroad Company be ordered to restore Upgraded Electrician Apprentice K. C. Grimes to the Carrier's service with seniority rights unimparied and compensated for all wage loss commencing with the date of his

discharge, September 21, 1976, and continuing thereafter until such time as he is restored to service.

3. That the Louisville and Nashville Railroad Company be further ordered to make Upgraded Electrician Apprentice K. C. Grimes whole with respect to all rights, privileges and benefits associated with his railroad employment, such as, but not limited to vacation, health and welfare and insurance benefits.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant was dismissed for insubordination, Carrier charging that on August 15, 1976, he failed to apply an electric switch on Cab 6428 and that he refused to comply with the instructions of his Foreman to surrender the switch after having refused to apply it to caboose 6428. Claimant entered Carrier's service on February 26, 1976, as an electrician's apprentice. At the time of the incident,

about 6 months later, he was working as an Upgraded Electrician.

On the day of the incident, Claimant reported to his foreman that Caboose 6428 would not be serviceable because of a bad light switch and that a replacement switch was not in stock. The foreman found a switch and gave it to Claimant with instructions to use it. The replacement switch given Claimant was a single-pole on and off type, whereas the defective light switch in the caboose was a 3-way switch.

Claimant indicated to his foreman that the installation of the replacement switch would be unsafe. The foreman assured him that the switch was safe and instructed him to use it. Claimant refused and also refused to turn over the switch to the foreman.

At the investigation, Claimant testified that he did not apply the switch because the amperage ratings on the two switches differed; that he was unsure of the results; that he wished to avoid responsibility for damaging company property; that he felt it was his responsibility since he had signed the caboose sheet; and that he retained the switch because he thought it might be used in proceedings against him.

A reading of the record discloses that the foreman told Claimant that he would take responsibility for directing Claimant to use the switch. At the investigation, the following colloquy took place between the Hearing Officer and the foreman:

> "Q. Did you observe the amperage reading on the new switch?

A. Yes, I did. The switch was a Bryant single pole toggle switch, with an amperage reading of 10 amps, 125 volts, 5 amps, 250 volts. I handed him the switchand showed him (Claimant) where it read 10 amps, 125 volts and he stated that this was the first time he had seen the 10 amps, 125 volts. He also stated he did not apply the switch because it read only 5 amps, 250 volts.

Q. Isn't the rating of this new switch the same as the switches that are to be applied to all cabooses?

A. The amperage reading on both of these switches are similar.

Q. Is there any reason why this switch could not have been applied to the caboose 6428 from your electrical experience and background?

A. No, with a wiring change the switch that he did not apply could be wired up in the on position and worked on the caboose effectively.

It is not clear from the record that an apprentice with less than 6 months service would know that the new switch could work with a wiring change or that the foreman instructed him at the time that a wiring change would make the switch operable and safe.

No showing has been made that installation of the switch given Claimant by the foreman would be unsafe, or that it placed Claimant in physical jeopardy. It is well understood that in case of personal danger to his health or safety, an employee is not obliged to comply with a

supervisor's instructions, but the record is barren of evidence of personal danger to Claimant.

We find in this case that although Claimant failed to comly with the foreman's instructions, we must recognize certain mitigating circumstances. Both the Claimant and the foreman overreacted to the situation, no doubt due in part to the fact that both were relatively new and inexperienced on their respective jobs. Claimant had been in the Company's employ for less than 6 months at the time of the incident. Moreover, although hired as an apprentice, he was working at the time as an Upgraded Electrician. The foreman was not Claimant's regular foreman but was filling a vacation vacancy.

Claimant's response and reaction to the Foreman's instructions were misguided, but not malicious. Even if he honestly believed that the switch given him was not safe he should have installed it when so directed by the foreman, particularly when the foreman advised him that he would take responsibility.

Generally speaking, it is the duty of employees to obey others. A cardinal principle in the law of the shop -- unless there is threat to an employee's life or limb -- is to "obey now, grieve later". Claimant should have complied with the foreman's request.

Based on a reading of the record, we have reached the following conclusion: Claimant's refusal was misguided, rather than capricious, stemming from his inexperience as an Upgraded Electrician which left him unsure and uncertain as to the safety risks involved in substituting one type of switch for another. The record

indicates that he did try to seek advice from nearby employees concerning the difference in the switches. Given that he had less than 6 months service at the time, having been hired as an apprentice, and the other factors hereinabove cited, we find mitigating and extenuating circumstances leading us to conclude that the discipline or dismissal was excessive, and that a lesser penalty is appropriate.

In reaching this conclusion, we do not condone Claimant's conduct. We caution Claimant that by this decision he is put on notice that he must comply with reasonable instructions from his supervisors and that he has no right to refuse to comply with such instructions in the absence of any probative evidence or valid reason that such instruction or order is arbitrary, unreasonable, discriminatory, or would subject him to clear and evident danger. His failure to do so will make him subject to discipline.

Carrier is to be commended for providing an opportunity for apprentices to upgrade themselves, but in our judgment this case emphasizes the need to consider an apprentice's capability to respond to the needs, requirements, and responsibilities of an upgraded position before such assignments are made.

Our decision then, is that the Claimant shall be reinstated to service with seniority rights unimpaired, but without compensation for time lost subsequent to the date of his dismissal.